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3781/2017/v20i0a1357](http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1357)**Abstract**

The traditional practice of polygyny, whereby only a man is allowed to marry more than one wife in a customary marriage, has long been perceived to be an offender of women's rights. Recent family law reforms on the African continent show that the focus has been on promoting and protecting the rights of women as defined in international human rights law, as well as on respecting the practice of polygyny. These legislative reforms in jurisdictions such as Kenya, Mozambique and South Africa show that the approach to regulating polygyny has been either to legalise, abolish, or regulate the practice. In view of the focus in these reforms on both women's rights and respect for the practice of polygyny, this paper examines the different approaches of the selected countries to regulating the practice. In particular, this paper investigates how these countries are striking a balance between polygyny and the protection of women's rights. It will also highlight the difficulties that law reformers face in regulating the practice in such a way as to protect women's rights, as well as the gaps in the law reforms that need to be addressed.

**Keywords**

Polygyny, Africa, Kenya, South Africa, Mozambique, abolish, legalise, family law, reforms, polygamy.

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# 1 Introduction

Polygyny is a traditional practice whereby *only* a man is allowed to marry more than one spouse.<sup>1</sup> This practice has long been perceived to be in conflict with the ideals of gender equality,<sup>2</sup> inherently subordinates women,<sup>3</sup> violates the dignity of women,<sup>4</sup> increases women's risk of contracting HIV/AIDS,<sup>5</sup> is emotionally damaging, and is economically oppressive.<sup>6</sup> In addition, polygyny is perceived to be rooted in violations of gender and women's rights, which are protected in the *Universal Declaration of Human Rights* (UDHR), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (African Women's Protocol), and the *International Covenant on Civil and Political Rights* (ICCPR).<sup>7</sup> These observations, which are in line with the

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<sup>1</sup> Emphasis added. Polygamy means the plurality of spouses. Most literature, however, refer to polygamy as plurality of wives. For that reason the term polygamy in this paper refers to polygyny. See eg similarly Obonye 2012 *JASD* 142-149; Bennett *Customary Law* 243; Mwambene 2010 *AHRLJ* 78-93; Luluaki "Customary Polygamy" 395-418; Howland and Koenen 2014 *Social Justice* 7; Strauss 2012 *Ethics* 516-544; Kaganas and Murray 1991 *Acta Juridica* 119.

<sup>2</sup> Banda *Women Law and Human Rights* 116; Valley 2010 <http://www.independent.co.uk/news/world/africa/the-big-question-whats-the-history-of-polygamy-and-how-serious-a-problem-is-it-in-africa-1858858.html>; Gaffney-Rhys 2011(a) *Women in Society* 1; CEDAW Committee *General Recommendation 21 on Equality in Marriage and Family Relations* UN GAOR, Doc A/49/38 (1994) (*General Recommendation 21*) para 14. See also Lehnert 2005 *SAJHR* 242.

<sup>3</sup> See eg Witte 2015 *Emory LJ* 1675-1746; Kaganas and Murray 1991 *Acta Juridica* 126, 127; Gaffney-Rhys 2011(b) *Women in Society* 6; Howland and Koenen 2014 *Social Justice* 12.

<sup>4</sup> *General Recommendation 21*; Jeffreys *Man's Dominion* 1967.

<sup>5</sup> See eg UN Women date unknown <http://www.endvawnow.org/en/articles/625-polygamousmarriages.html?next=1678>; Kuhn date unknown <https://www.du.edu/korbel/hrhw/researchdigest/africa/UniversalHumanRights.pdf>; Ndashe 2011 *Women's Legal Centre* 7.

<sup>6</sup> *General Recommendation 21* para 14 where it was reaffirmed that "polygamous marriages contravenes a woman's right to equality with men, and can have serious emotional and financial consequences for her and her dependants ..."; and Howland and Koenen 2014 *Social Justice* 12.

<sup>7</sup> Article 23(4) of the *International Covenant on Civil and Political Rights* (1966) (ICCPR) provides for equality in relation to marriage. See also art 6 of the *Protocol of the African Charter on Human and People's Rights on the Rights of Women in*

comments of the international human rights monitoring bodies, lead to a call for the regulation or abolition of polygyny.<sup>8</sup>

Most African State Parties to the international women's rights instruments have embarked on family law reforms, with implications for polygyny.<sup>9</sup> A review of these reforms shows that countries have focused on promoting and protecting the rights of women as defined in international human rights law,<sup>10</sup> while simultaneously respecting the practice of polygyny.<sup>11</sup> Illustrations mainly from Kenya,<sup>12</sup> Mozambique,<sup>13</sup> and South Africa<sup>14</sup> reveal that polygyny is being legalised, abolished or regulated in those jurisdictions. As the reforms focus on women's rights while simultaneously respecting the practice of polygyny, this paper examines the different approaches of these countries in regulating the practice. In particular, it examines how these countries are attempting to strike a balance between polygyny and the protection of women's rights. A further aim is to explore the impact of these approaches on the future of polygyny in Africa.

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*Africa* (2003) (*African Women's Protocol*). See discussions by eg Sraman date unknown [http://www.academia.edu/3559600/polygamy\\_and\\_human\\_rights](http://www.academia.edu/3559600/polygamy_and_human_rights); Kuhn date unknown <https://www.du.edu/korbel/hrhw/researchdigest/africa/UniversalHumanRights.pdf>; Strauss 2012 *Ethics* 518; Obonye 2012 *JASD* 147; Howland and Koenen 2014 *Social Justice* 12; Gaffney-Rhys 2011(a) *Women in Society* 2.

<sup>8</sup> Howland and Koenen 2014 *Social Justice* 12; Cook and Kelly 2006 <http://www.justice.gc.ca/eng/rp-pr/other-autre/poly/index.html>; Human Rights Committee *General Comment 28 on Equality of Rights between Men and Women* CCPR/C/21/Rev.1/Add.10 (2000) (*General Comment 28*) para 24 in which the Human Rights Committee responsible for the monitoring of the ICCPR confirms that polygamy should be eradicated because it is discriminatory. See also *General Recommendation 21* para 21; Al Hammadi 2015 <https://www.linkedin.com/pulse/negative-consequences-polygamy-zainab-al-hammadi>.

<sup>9</sup> For example, South Africa ratified the *Convention on Elimination of All Forms of Discrimination against Women* (1979) (CEDAW) in 1995 and the *African Women's Protocol* in 2004; Kenya ratified CEDAW in 1984; Rwanda ratified CEDAW in 1981; Malawi in 1987; Mozambique ratified CEDAW in 1997, CRC in 1994, ICCPR in 1994, *African Charter on Human and People's Rights* (1981) (ACHPR) in 1989 and the *African Women's Protocol* in 2005. In addition, CEDAW was ratified by Senegal in 1980, Swaziland in 2004, Congo in 1980, Democratic Republic of Congo in 1986, Tanzania, Nigeria and Zambia in 1985, Zimbabwe in 1991, Uganda in 1984, Namibia in 1992.

<sup>10</sup> See for example, *General Recommendation 21* para 21; art 6(c) of the *African Women's Protocol*; art 23(4) of the ICCPR.

<sup>11</sup> See eg ss 2(3) (4) and 7(6) of the *Recognition of Customary Marriages Act* 120 of 1998, that recognises polygyny while at the same time s 6 provides for the equal status and capacity of spouses in a customary marriage. Also see Mamashela and Xaba 2003 <http://sds.ukzn.ac.za/files/rr59.pdf>, who observe, among others, that "the Recognition of Customary Marriages Act recognises polygynous customary marriages concluded before and after the enactment of the Act".

<sup>12</sup> The *Marriage Act* 14 of 2014.

<sup>13</sup> The *Family Law Statute Act* 10 of 2004.

<sup>14</sup> The *Recognition of Customary Marriages Act* 120 of 1998.

The paper is divided into six sections. The second section gives a brief overview of the history of polygyny in Africa. The third section outlines the international and regional human rights position on polygyny. The fourth section will explore the manner in which selected African countries have legally approached the issue of polygyny. The focus will be on key aspects of the law reform, including: the marriageable age, the consent to marriage, the equal status of spouses in a marriage, the registration of a marriage, and protection against discrimination in marriage. The fifth part will be a critical analysis of the different law reforms adopted by the selected countries. The last part concludes the discussion by observing that regardless of whether countries legalise, abolish or regulate polygyny, the essence of polygyny in Africa is not going to change.

## 2 Brief overview of polygyny in Africa

Prior to the arrival of colonists and Christianity in Africa, polygyny existed as an integral part of family law, which was based mostly on cultural beliefs.<sup>15</sup> Traditionally, polygyny performed valuable social and cultural functions. These included the following, among others: it was a remedy to escape divorce due to infertility, because in African communities a marriage without procreation is incomplete;<sup>16</sup> it was a solution to menopause as there was a cultural belief that some women may no longer engage in sexual activities but men will continue to do so;<sup>17</sup> it was a legal response to address the problem of unmarried women snatching away other women's husbands due to the imbalance in the ratio of women and men;<sup>18</sup> it was a viable solution during pregnancy and nursing because some African cultures forbid sexual relations between a husband and wife during pregnancy;<sup>19</sup> it was a remedy to negative social associations because being single is associated with evil, and a single woman might even be accused of witchcraft;<sup>20</sup> it was a way of taking care of a widow, as both a widow and her children would be taken

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<sup>15</sup> Nyanseor date unknown <http://www.theperspective.org/polygyny.html>; Modupe date unknown [http://unilorin.edu.ng/publications/abdulraheemnm/LAW\\_AND\\_SOCIAL\\_VALUES.pdf](http://unilorin.edu.ng/publications/abdulraheemnm/LAW_AND_SOCIAL_VALUES.pdf).

<sup>16</sup> Muthengi 1995 *AJET* 58. Mbiti *African Religion and Philosophy* 133. In the African context, it is generally observed that a marriage without procreation is incomplete. A woman is always presumed to be at fault for her lack of procreation in a marriage.

<sup>17</sup> Baloyi 2010 *Verbum et Ecclesia* 3.

<sup>18</sup> As observed by Nyanseor date unknown <http://www.theperspective.org/polygyny.html>, the social origins of polygyny were the imbalance between women and men, in that the ratio of women to men was 10:1. This imbalance led the social architects to look at polygyny as a solution to enable more women to marry.

<sup>19</sup> Also see Baines, Bailey and Amani 2005 <http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf>; Labeodan 2007 *JCT* 46.

<sup>20</sup> Phaswana "Counselling Singles" 1.

care of by the deceased husband's brother;<sup>21</sup> and more importantly, it was "established to address the economic issues which were centred on subsistence agriculture".<sup>22</sup> These social functions arguably served the interests of men.<sup>23</sup>

In the context of this paper, it is important to point out that these social functions have not ceased with time. As observed by Da Silva, during the debate on the *Family Law Statute Act* in Mozambique, those who defended polygamy raised similar arguments.<sup>24</sup> In Malawi, similar views were expressed for the rejection of section 17 of the *Marriage, Divorce and Family Relations Bill* of 2006, that prohibited polygyny in all marriages.<sup>25</sup> In Uganda, Parliament has failed twice to pass the *Uganda Marriage and Divorce Bill*, 2009 in 2009 and 2013 respectively, due to its provisions relative to polygyny, amongst other reasons.<sup>26</sup> In addition, the Chairperson of the Ugandan Law Reform Commission, Prof Joseph Kakooza, observed during the debate that:

polygamy as a custom will remain, not only in Uganda, but also in all African countries and even beyond. What [goes] as a mistress in Europe [is a wife in Africa]. Once the first marriage is customary, you can marry under customary law even 100 or more, provided the custom allows it.<sup>27</sup>

During the colonial period, when Christianity prevailed, polygyny was one of the reasons why customary marriages were not legally recognised.<sup>28</sup> It was viewed as a form of slavery which had to be abolished.<sup>29</sup> In general, Christian colonials were determined to replace it with monogamy.<sup>30</sup> In their attempt to replace polygamy with monogamy, they gave preferential treatment to monogamous men. For example, Muthengi records that some Christian missionaries refused to accept polygamists and their families into

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<sup>21</sup> Muthengi 1995 *AJET* 59.

<sup>22</sup> Nyanseor date unknown <http://www.theperspective.org/polygyny.html>; Muthengi 1995 *AJET* 59.

<sup>23</sup> See generally, Da Silva *et al* 2004 <http://www.wlsa.org.mz/article-why-polygamy-is-unacceptable-in-family-law-in-the-light-of-human-rights/>. Also see similar views expressed by Howland and Koenen 2014 *Social Justice* 37.

<sup>24</sup> See generally Da Silva *et al* 2004 <http://www.wlsa.org.mz/article-why-polygamy-is-unacceptable-in-family-law-in-the-light-of-human-rights/>. Also see similar arguments raised in the context of the 2009 and 2013 Ugandan *Marriage and Relations Bill*.

<sup>25</sup> See Malawi Law Commission 2006 [http://www.lawcom.mw/docs/Report\\_on\\_the\\_review\\_of\\_Marriage\\_and\\_Divorce\\_Act.pdf](http://www.lawcom.mw/docs/Report_on_the_review_of_Marriage_and_Divorce_Act.pdf) 110.

<sup>26</sup> Mugerwa *Daily Monitor* 1.

<sup>27</sup> Ssenyonjo 2011 *NQHR* 376.

<sup>28</sup> Bennett *Customary Law* 189. Kang'ara 2012 *Comp L Rev* 5, Henriques 2013 *Studia Historiae Ecclesiasticae*.

<sup>29</sup> Obonye 2012 *JASD* 142-149; Bennett *Customary Law* 189; Herbst and Du Plessis 2008 *EJCL* 5.

<sup>30</sup> Kang'ara 2012 *Comp L Rev* 2. Also see Henriques 2013 *Studia Historiae Ecclesiasticae*.

the church.<sup>31</sup> In some cases, upon conversion to Christianity polygynous husbands were required to choose one customary wife with whom to contract a Christian marriage and abandon the rest, leading to "the discarded wife syndrome" on the continent.<sup>32</sup>

This situation, however, did not stop the practice of polygyny. Many African countries continued with the practice and it remained permissible under the customary laws of various societies.<sup>33</sup> In some places, it led to members forming their own independent churches. For example, Muthengi records that Isaiah Shembe, the founder of the Nazarite Baptist church in South Africa, had four wives; Josiah Oshitelu, the founder of the Aladura (the Church of the Lord) had seven wives; and Johane Marange, the founder of the African Apostolic Church in Zambia and Zimbabwe, had sixteen wives.<sup>34</sup>

In the modern context, although statistics on polygynous marriages suggests that the frequency of polygynous marriages is decreasing<sup>35</sup> and the general opinion is that they disadvantage women and must be prohibited, polygyny still exists on the continent.<sup>36</sup> For example, reports indicate that almost 47% of marriages in Senegal feature more than one wife.<sup>37</sup> In Tanzania, Howland and Koenen report that a quarter of its women are involved in polygamous marriage.<sup>38</sup> In Kenya, Akuku Danger is believed to have been married to more than 100 wives.<sup>39</sup> Furthermore, polygyny has the support of prominent political figures on the continent. For example, Kenyan President Kibaki has two wives; King Mswati III of Swaziland has 14 wives;<sup>40</sup> the South African President, Jacob Zuma, is married to more than 3 wives; in Sudan, President Omar Hassan al-Bashir has always maintained that polygyny is a viable option to increase the population;<sup>41</sup> and

<sup>31</sup> Muthengi 1995 *AJET* 57. Barrett *Schism and Renewal in Africa* 117.

<sup>32</sup> Kang'ara 2012 *Comp L Rev* 16.

<sup>33</sup> Bennett *Customary Law* 187, 192.

<sup>34</sup> Muthengi 1995 *AJET* 55, 57.

<sup>35</sup> See, for example, the decline in the statistics in Namibia as reported by Ovis 2005 <http://www.lac.org.na/news/inthenews/pdf/polygamy.pdf>; and in Malawi by Basendal 2004 *Afr Sociol Rev* 17. In South Africa, Bekker 1991 *Acta Juridica* 4 observed that "the situation in South Africa is comparable. In urban areas polygyny has to all intents and purposes disappeared". Also see Mwambene and Kruuse 2015 *IJLPFL* 252; Mwambene 2015 *Speculum Juris* 76.

<sup>36</sup> See, for example, Fenske 2012 <http://www.csae.ox.ac.uk/workingpapers/pdf/csae-wps-2012-20.pdf>.

<sup>37</sup> Anon 2015 <https://www.polygamy.com/articles/89746509/polygamy-in-africa>; Fenske 2012 <http://www.csae.ox.ac.uk/workingpapers/pdf/csae-wps-2012-20.pdf> has observed that "stretching from Senegal to Tanzania, 40% of women are in polygamous marriages".

<sup>38</sup> Howland and Koenen 2014 *Social Justice* 3-38.

<sup>39</sup> Anon 2015 <https://www.polygamy.com/articles/89746509/polygamy-in-africa>. Also see Gaffney-Rhys 2011(b) *Women in Society* 1.

<sup>40</sup> Ssenyonjo 2011 *NQHR* 376.

<sup>41</sup> Anon 2015 <https://www.polygamy.com/articles/89746509/polygamy-in-africa>.

in 2014, President Uhuru Kenyatta signed a law that allows men to marry as many wives as they wish without their existing wife's/wives' consent.<sup>42</sup>

Polygyny in urban African areas appears to take on different forms, such as informal marriages, or second or third marriages without the knowledge of the first wife.<sup>43</sup> For example, the 2000 Demographic Health Survey conducted in Namibia shows that 16% of women are in informal relationships.<sup>44</sup> In Malawi, Basendal's research found that there is a change in marriage patterns from formal to informal polygyny, which is to the advantage of one woman and simultaneously to the disadvantage of the other.<sup>45</sup> In Botswana, the study by Griffith found that men prefer informal polygyny in order to escape the obligations of plural marriages.<sup>46</sup> In the large cities of Tanzania, Howland and Koenen reported that traditional polygyny has been replaced to a large extent by informal polygyny.<sup>47</sup> In addition, Women and Law in Southern Africa (WLSA) report that migrant workers contract marriages with women in the rural areas and then enter into informal unions with women in the cities.<sup>48</sup>

The continued existence of polygyny can be attributed to the fact that polygyny, as Kuhn observes, is legally permitted in many African countries, such as Chad, Gabon, Niger, Sudan, Tanzania, and Zambia.<sup>49</sup> The legal recognition of polygyny on the continent has taken different forms. Some African countries such as Kenya have formally recognised polygynous marriages as valid marriages.<sup>50</sup> Other countries such as Malawi allow polygyny under the unwritten customary laws.<sup>51</sup> Gaffney-Rhys has observed that there are also countries such as South Africa that have opted to formalise existing customary laws but impose restrictions on the

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<sup>42</sup> AFP 2014 <http://www.nation.co.ke/news/Uhuru-assents-to-law-allowing-polygamy/1056-2297540-x731pa/index.html>.

<sup>43</sup> WLSA *Uncovering the Realities* 92; Ovis (n 35).

<sup>44</sup> Ovis 2005 <http://www.lac.org.na/news/inthenews/pdf/polygamy.pdf>.

<sup>45</sup> Basendal 2004 *Afr Sociol Rev* 17.

<sup>46</sup> Griffiths "Gendering Culture" 111-112; Basendal 2004 *Afr Sociol Rev* 17.

<sup>47</sup> Howland and Koenen 2014 *Social Justice* 11, who observe that "in large cities like Dares Salam, traditional polygamy has been largely replaced by private, *de facto* polygamy, which is considered to be more attuned to Tanzanians' perceptions of modernity". In addition, they observe that "*de facto* polygamy is characterised as a relationship in which a man marries one wife and also forms extra-legal domestic and sexual unions with other women".

<sup>48</sup> WLSA *Uncovering the Realities* 25.

<sup>49</sup> See generally the discussion by Kuhn date unknown <https://www.du.edu/korbel/hrhw/researchdigest/africa/UniversalHumanRights.pdf>. Also see Gaffney-Rhys 2011(b) *Women in Society* 2.

<sup>50</sup> See the *Marriage Act* 14 of 2014. Gaffney-Rhys 2011(b) *Women in Society* 2.

<sup>51</sup> The Malawi *Marriage Divorce and Family Relations Act* 5 of 2015 does not formally prohibit polygamy in the context of customary marriages. Arguably it allows the same to continue under the customary laws and practices. See generally Gaffney-Rhys 2011(b) *Women in Society* 2.

practice.<sup>52</sup> In addition, some countries continue to formally prohibit polygyny under civil law, but the practice remains lawful under the customary law of the country.<sup>53</sup> In exceptional cases the practice is allowed, but a man is required to obtain the permission of his current wife if he wishes to take another wife.<sup>54</sup>

### 3 Polygyny under international human rights law

As widely observed, the international human rights instruments, with the exception of the *Hague Convention on the Celebration and Recognition of Marriages*<sup>55</sup> and the *African Women's Protocol*,<sup>56</sup> do not expressly consider polygamy.<sup>57</sup> However, they require States Parties to eradicate practices that may lead to discrimination.<sup>58</sup> As noted, polygyny is a system that only allows men to have multiple wives. Most authors therefore agree that non-discriminatory provisions in these international human rights instruments can be used to address discrimination in the context of polygyny.<sup>59</sup> International human rights instruments further contain provisions aimed at ensuring the equality of spouses before, during and after marriage.<sup>60</sup> For

<sup>52</sup> See eg the *Recognition of Customary Marriages Act* 120 of 1998 in South Africa, which recognises polygamous marriages. Gaffney-Rhys 2011(b) *Women in Society* 2.

<sup>53</sup> For example, in Malawi, polygamy is prohibited under s 17 of the *Marriage Divorce and Family Relations Act* 5 of 2015 for civil marriages but is allowed for customary and religious marriages. Also see the *Recognition of Customary Marriages Act* 120 of 1998 in South Africa, which allows for a monogamous customary marriage to be converted into a civil law marriage, but a polygynous customary marriage cannot be converted into a civil marriage (s 10(4)).

<sup>54</sup> See the South African case of *Mayelane v Ngwenyama* 2013 4 SA 415 (CC).

<sup>55</sup> Article 11 of the *Hague Convention on the Celebration and Recognition of Marriages* (1978) mandates a contracting state to refuse to recognise the validity of a polygynous marriage. This instrument, however, does not outlaw polygamy.

<sup>56</sup> Article 6 of the *African Women's Protocol* states that "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including polygamous marital relationships, are promoted and protected". In art 5 of the *African Women's Protocol*, however, polygyny is not listed as one of the harmful cultural practices to be eliminated.

<sup>57</sup> See generally the discussions by Gaffney-Rhys 2011(a) *Women in Society* 1, 2; Cook 2011 [http://www.law.utoronto.ca/utf1\\_file/count/documents/reprohealth/Polygamy.pdf](http://www.law.utoronto.ca/utf1_file/count/documents/reprohealth/Polygamy.pdf). See for instance art 16 of CEDAW, that just states that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family [and] are entitled to equal rights as to marriage, during marriage and at its dissolution".

<sup>58</sup> Cook 2011 [http://www.law.utoronto.ca/utf1\\_file/count/documents/reprohealth/Polygamy.pdf](http://www.law.utoronto.ca/utf1_file/count/documents/reprohealth/Polygamy.pdf). Also see Gaffney-Rhys 2011(a) *Women in Society* 1.

<sup>59</sup> See, for example, Gaffney-Rhys 2011(a) *Women in Society* 1.

<sup>60</sup> For example, art 16 of CEDAW, which just states that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family [and] are entitled to equal rights as to marriage, during marriage and at its dissolution". Also see the discussion by Obonye 2012 *JASD* 147.



example, article 23(4) of the ICCPR, as well as article 6 of the *African Women's Protocol*, specifically provides for equality in relation to marriage.<sup>61</sup>

In addition, as rightly observed by Gaffney-Rhys, the General Comments by the treaty monitoring bodies endorse the elimination of polygyny because it is discriminatory.<sup>62</sup> For example: the Human Rights Committee in *General Comment 28* observes that "equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle and therefore, should be abolished".<sup>63</sup> It has also found that polygyny violates article 3 of the ICCPR<sup>64</sup> and has therefore urged States Parties to take legislative measures to enforce the prohibition of polygamy within their territories.<sup>65</sup> In addition, the CEDAW Committee noted in its *General Recommendation 21* that "polygynous marriages contravene a woman's right to equality with men and must therefore be prohibited".<sup>66</sup>

In countries where polygyny is still practised, international human rights instruments require States Parties to ensure that women are entitled to the same rights and benefits as they would enjoy in monogamous marriages.<sup>67</sup> Article 6 of the *African Women's Protocol* states that: "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, *including polygamous marital relationship are promoted and protected*".<sup>68</sup> This is buttressed by the CEDAW Committee's *General Recommendation 29*, which makes it clear that: "with regard to women in existing polygamous marriages, States Parties should take the necessary measures to ensure the protection of their economic rights".<sup>69</sup>

In addition, international human rights law also mandates States Parties to take all appropriate measures to eliminate harmful cultural practices in order

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<sup>61</sup> Article 23(4) of the ICCPR provides that States: "shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution".

<sup>62</sup> See, for example, *General Recommendation 21* para 21 and *General Comment 28* para 24, as discussed by Gaffney-Rhys 2011(a) *Women in Society* 10.

<sup>63</sup> *General Comment 28* para 24.

<sup>64</sup> The Human Rights Committee observed that art 3 of the ICCPR guarantees equal rights for women and men, violates a woman's right to equality in marriage, and has severe financial consequences for her and her children. See *General Comment 28*.

<sup>65</sup> CEDAW Committee *General Recommendation 24 on Women and Health* UN GAOR, Doc A/54/38 (1999) (*General Recommendation 24*).

<sup>66</sup> *General Recommendation 21* paras 14, 21.

<sup>67</sup> See, for example, art 6 of the *African Women's Protocol*, and the discussions by Cook and Kelly 2006 <http://www.justice.gc.ca/eng/rp-pr/other-autre/poly/index.html>.

<sup>68</sup> Emphasis added.

<sup>69</sup> CEDAW Committee *General Recommendation 29 on Economic Consequences of Marriage, Family Relations and their Dissolution* UN Doc CEDAW/C/GC/29 (2013) (*General Recommendation 29*).

to ensure equality in marriage.<sup>70</sup> Further guidance at the international level can be obtained from the CEDAW Committee, which has observed that States Parties whose constitutions guarantee equal rights but permit polygynous marriages in accordance with personal or customary law violate the constitutional rights of women and breach the provisions of article 5(a) of CEDAW.<sup>71</sup> For example, the 2010 Kenya Constitution guarantees equality between the spouses from the outset of a marriage to its dissolution.<sup>72</sup> Several African countries, for example Tanzania,<sup>73</sup> Malawi,<sup>74</sup> South Africa,<sup>75</sup> and Mozambique,<sup>76</sup> have provisions in their constitutions that prohibit discrimination on a number of grounds, including gender.

Related to the above point, a review of the concluding observations made concerning African states' reports buttresses the opinion of CEDAW that nothing short of immediate legislative prohibition will do.<sup>77</sup> For instance, Hellum and Aasen report that at its 39<sup>th</sup> Session in 2007 and 48<sup>th</sup> Session in 2011 the Committee took the view that the Kenya *Matrimonial Bill*, which provided for the regulation of property in a polygynous customary marriage, facilitates polygyny, and therefore urged the Government to "implement measures aimed at eliminating polygamy as called for in the Committee's General Recommendation 21".<sup>78</sup>

Furthermore, Hellum and Aasen have observed that Lesotho was similarly reprimanded when it reported before the CEDAW Committee that polygamy "is an acceptable customary practice, which has safeguards against potentially negative consequences for wives and children, ie the requirement that existing spouses must be consulted and by providing separate property to each household".<sup>79</sup> In response, the CEDAW

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<sup>70</sup> Article 5(a) of CEDAW provides that "States Parties shall take all appropriate measures: To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

<sup>71</sup> *General Recommendation 21* para 41.

<sup>72</sup> Section 45(3) of the *Constitution of the Republic of Kenya*, 2010.

<sup>73</sup> Sections 12, 13 of the *Constitution of the Republic of Tanzania*, 1977.

<sup>74</sup> Section 20 of the *Constitution of the Republic of Malawi*, 1994.

<sup>75</sup> Section 9(3) of the *Constitution of the Republic of South Africa*, 1996.

<sup>76</sup> Article 36 of the *Constitution of the Republic of Mozambique*, 2004.

<sup>77</sup> Cook 2011 [http://www.law.utoronto.ca/utfl\\_file/count/documents/reprohealth/Polygamy.pdf](http://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/Polygamy.pdf).

<sup>78</sup> CEDAW Committee *Concluding Observations: Kenya* CEDAW/C/KEN/CO/7 (2011) para 17; Hellum and Aasen *Women's Human Rights*.

<sup>79</sup> CEDAW Committee *Concluding Observations: Lesotho* CEDAW/C/LSO/CO/1-4 (2011) para 47; Hellum and Aasen *Women's Human Rights*.

Committee expressed concern about the persistence of the practice and the Government's limited efforts to address the matter.<sup>80</sup>

In conclusion, therefore, the international human rights position is that polygyny violates the right to equality in the context of marriage and must therefore be prohibited. In countries where it is still allowed and practised, States Parties must ensure that women are entitled to the same rights and benefits they would have enjoyed in monogamous marriages.

As earlier noted, most African countries are party to the international human rights law on the protection of women's rights. The following discussion, therefore, examines how selected countries have responded to their international obligations, starting with Kenya.

## **4 Legal responses to polygyny and women's rights in Africa**

### **4.1 Kenya**

The starting point in exploring Kenya's legal response to polygyny and the protection of women's rights is article 45(4) of the 2010 Kenyan Constitution. It provides that "Parliament may enact laws to recognise marriage, under any system, to the extent that such marriages or systems of law are consistent with the Constitution". As Byrnes and Freeman rightly observe, this provision requires the state to enact legislation that provides equality between spouses in all marriage systems.<sup>81</sup> In addition, the Constitution provides that "parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at its dissolution".<sup>82</sup> Article 45(3) is therefore a "direct" response to article 16(1) of CEDAW, above, that prescribes that husbands and wives have equal rights in marriage.<sup>83</sup>

In responding to both its constitutional and its international obligations, the Kenya government enacted the *Marriage Act*, 2014 (hereinafter called the *Marriage Act*).<sup>84</sup> The *Marriage Act* is the main legislation that regulates Christian, civil, customary, Hindu and Islamic marriages.<sup>85</sup> The proprietary aspects relating to marriage are, however, regulated by the *Matrimonial*

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<sup>80</sup> CEDAW Committee *Concluding Observations: Lesotho* CEDAW/C/LSO/CO/1-4 (2011) para 20 and 21; Hellebrunn and Aasen *Women's Human Rights*. Also see similar observations made with respect to CEDAW Committee *Concluding Observations: Malawi*, CEDAW/C/MW1/CO/6 (2010) para 42.

<sup>81</sup> Byrnes and Freeman 2012 <http://ssrn.com/abstract=2011655>.

<sup>82</sup> Article 45(3) of the *Constitution of the Republic of Kenya*, 2010.

<sup>83</sup> Byrnes and Freeman 2012 <http://ssrn.com/abstract=2011655>. Kenya became party to CEDAW in 1984.

<sup>84</sup> The *Marriage Act* 4 of 2014, which came into force on 20 May 2014.

<sup>85</sup> Section 6 of the *Marriage Act* 4 of 2014.

*Property Act*, 2013.<sup>86</sup> These two pieces of legislation have provisions that speak to the recognition and regulation of polygyny in the following ways.

Firstly, in its recognition of polygyny the Kenya *Marriage Act* defines it as "the state or practice of a man having more than one wife simultaneously".<sup>87</sup> This definition clearly excludes women from having more than one husband. This provision therefore violates articles 16(1) of CEDAW and article 45(3) of the Kenya Constitution, which prohibits discrimination of any kind in the context of marriage. Secondly, a marriage is defined as "the voluntary union of a man and a woman whether in a monogamous or polygynous union and registered in accordance with the Act".<sup>88</sup> The importance of registration in the protection of women's rights cannot be overemphasised. Registration of a customary marriage can unlock doors leading to equal property rights entitlements among the polygynous wives, particularly after the death of husband. However, this provision, read together with section 44 (to be discussed later), makes the validity of a marriage depend on registration. Due to the well-known challenges that rural communities face to register marriages, such a provision may, however, lead to adverse results in the protection of women's rights, particularly in a polygynous customary marriage system.<sup>89</sup> Thirdly, according to section 6(3), "a marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous."<sup>90</sup> This provision treats women married under customary law and Islamic law differently from women in civil and Hindu marriages. This is a violation of article 45(3) of the Constitution.

In their totality, however, these provisions speak to the legality (the recognition) of polygyny in Kenya.

In its protection and promotion of women's (children's) rights in the context of polygyny, the *Marriage Act* has several provisions that can be used to address the violations. For example, the marriageable age for all marriages, including customary marriages, is now 18 years.<sup>91</sup> Setting the marriageable age at 18 complies with international children's rights standards, and sends out a strong message that child marriages under any law are not allowed in Kenya.<sup>92</sup> In the context of this discussion, however, we see that prescribing

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<sup>86</sup> The *Matrimonial Property Act* 49 of 2013, which came into force on 16 January 2014.

<sup>87</sup> Section 2 of the *Marriage Act* 4 of 2014.

<sup>88</sup> Section 3(1) of the *Marriage Act* 4 of 2014.

<sup>89</sup> See, generally, the discussion by Mwambene and Kruuse 2015 *IJLPF* 237-259.

<sup>90</sup> Section 6(3) of the *Marriage Act* 4 of 2014.

<sup>91</sup> See s 4 as read with s 45(3)(a) of the *Marriage Act* 4 of 2014. S 4 provides that "a person shall not marry unless that person has attained the age of 18 years".

<sup>92</sup> It is generally accepted that child marriages breach art 16(2) of CEDAW; art 21 of the *African Charter on the Rights and Welfare of the Child* (1990) (*African Children's Charter*); art 1 of the *Convention on Consent to Marriage, the Minimum Age for Marriage and Registration of Marriages* (1962); and art 6 of the *African Women's*

a marriageable age is a departure from traditional customary rules that attach marriage to puberty, and other cultural practices which predispose young girls to polygynous marriages.<sup>93</sup> As observed by Gaffney-Rhys, in the context of polygyny, "the marriageable age is pushed down for females, leading to plural wives often being very young".<sup>94</sup>

Further protection under the Kenya *Marriage Act* is provided under the registration provisions.<sup>95</sup> A polygynous customary marriage, just like all other marriages recognised in the Kenya *Marriage Act*, can now be registered.<sup>96</sup> The merits of registration in the protection of children and women's human rights in the context of polygyny cannot be overemphasised. It induces the parties to the marriage to meet the necessary legal requirements, ie marriageable age and consent. More importantly, the process of registration can protect women from entering into informal polygynous marriages without their knowledge.<sup>97</sup> However, as earlier observed, "the status of a marriage" under the Kenya *Marriage Act* is conferred on a customary marriage only when the parties notify the Registrar of the marriage within 3 months of celebrating the marriage.<sup>98</sup> This position may arguably lead to women's "disfranchisement" due to the fact that many women live in disadvantaged rural communities where access to registration is difficult.<sup>99</sup>

Another important provision that can be used to address women's rights violations in the context of polygyny is section 2 of the *Marriage Act*. It provides that "parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage".<sup>100</sup> This provision is in line with international human rights law as well as with the constitution on the topic of the equal protection of the spouses in a marriage. It guarantees the right to equality for a woman in a polygynous marriage with her husband. However, read together with the provisions of the *Matrimonial Property Act*, 2013 (MPA), which regulates

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*Protocol*, which require parties to a marriage to provide free and full consent to marriage. In addition, other human rights infringement are committed if young girls are forced to marry, including the right to education, freedom from sexual exploitation, health and life.

<sup>93</sup> Section 4 of the *Marriage Act* 4 of 2014 prescribes the marriageable age to be 18.

<sup>94</sup> Gaffney-Rhys 2011(b) *Women in Society* 5.

<sup>95</sup> Section 55 of the *Marriage Act* 4 of 2014.

<sup>96</sup> Section 4 of the *Marriage Act* 4 of 2014.

<sup>97</sup> Kamau date unknown <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>.

<sup>98</sup> Section 44 of the *Marriage Act* 4 of 2014

<sup>99</sup> Banda 2006 *JAL* 76. See generally De Souza 2013 *Acta Juridica* 239-272 on how the non-registration of customary marriages can disadvantage women and children. Also see the discussion by Mwambene and Kruuse 2013 *Acta Juridica* 302; Kovacs, Ndashe and Williams 2013 *Acta Juridica* 278-280.

<sup>100</sup> Section 2 of the *Marriage Act* 4 of 2014.

matrimonial property in the context of polygynous marriages,<sup>101</sup> it seems that in a polygynous marriage a husband has more property rights than each of his wives. This argument is supported by the fact that section 8 of the MPA regulates matrimonial property in the context of polygynous marriages as follows: "where property was equally acquired by the man and his first wife before he took on the other wives, then the property is held equally by the husband and his first wife."<sup>102</sup>

Several observations made by Banda in the protection of women's rights in a polygynous marriage are relevant to this discussion.<sup>103</sup> First, she observes that the MPA provides that "if there are multiple wives when the property is acquired, the property is to be regarded as owned by the man and his wives taking into account any contributions made by the man and each of his wives".<sup>104</sup> Secondly, the MPA makes provision for joint ownership in the context of polygynous marriages, which is made possible where a wife in a polygynous marriage can jointly own property with the husband to the exclusion of other wives.<sup>105</sup> Arguably, in their totality, the husband will still have more shares in the property that he owns together with each of his wives, which defeats the principle of the equal sharing of matrimonial property between a husband and wife.

Furthermore, section 2 of the *Marriage Act* provides for the equal rights and obligations of spouses in a marriage. In the context of polygynous marriages, it grants a wife rights equal to those of her husband in decisions that will affect her. However, this provision is without legal content, since a husband can marry subsequent wives without her consent.<sup>106</sup> There is a need, therefore, for an enabling provision to allow a woman to give consent when the husband wishes to marry a subsequent wife/wives.

To conclude, therefore, the exploration of Kenya's legal response in the context of polygyny shows that despite its positive outward appearance of addressing women's rights violations, the *Marriage Act* is not comprehensive. It does not cover all aspects of marriage and divorce, particularly the proprietary consequences of polygynous marriages. Moreover, in balancing polygyny and women's rights, the *Marriage Act* has

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<sup>101</sup> Banda "Changing the Constitution" 255.

<sup>102</sup> Section 8(1)(a) of the *Matrimonial Property Act* 49 of 2013; Banda "Changing the Constitution" 264.

<sup>103</sup> Banda "Changing the Constitution" 264.

<sup>104</sup> Section 8(2)(b) of the *Matrimonial Property Act* 49 of 2013.

<sup>105</sup> Section 8(2) of the *Matrimonial Property Act* 49 of 2013.

<sup>106</sup> The *Marriage Act* 4 of 2014 is silent on the matter.

recognised the traditional African way of allowing only a husband to marry as many wives as he wishes without the existing wife's consent.<sup>107</sup>

## 4.2 Mozambique

The legal response in the protection of women's rights in the context of polygyny originates from the principle of equality between men and women embedded in article 36 of the Mozambique Constitution.<sup>108</sup> This principle of equality is also embedded in the *Family Law Statute*, which is the principal act that regulates religious, statutory and customary marriages in Mozambique.<sup>109</sup> Arguably, the equality principle in marriage is safeguarded by article 53(c) of the *Family Law Statute*, for instance, which bans marriages which do not have the consent of the parties.<sup>110</sup>

So, how has the *Family Law Statute* balanced polygyny and women's rights? The starting point in attempt to answer this question is the definition of the marriage. The *Family Law Statute* defines a marriage as "a relationship between two persons of the opposite sex".<sup>111</sup> This definition clearly prohibits polygamy since only two persons of the opposite sex are allowed to marry.<sup>112</sup> Commentators have thus welcomed the *Family Law Statute* "as a first step to ensure equality of spouses in marriage".<sup>113</sup> The definition of marriage therefore complies with the international approach of prohibiting polygyny to address women's rights violation. However, the fact that polygyny is not implicitly prohibited in the *Family Law Statute* could be problematic. This position, arguably, does not send a clear message on the status of polygyny in Mozambique. It may explain why in 2013 the Human Rights Committee was still concerned that polygyny continues to exist despite the *Family Law Statute* that attempts to address it.<sup>114</sup>

<sup>107</sup> Section 2 of the *Marriage Act* 4 of 2014.

<sup>108</sup> Plan International *In-depth Review* 21. Art 36 provides that "men and women are equal before the law".

<sup>109</sup> *Family Law Statute Act* 10 of 2004 as cited by Plan International *In-depth Review* 18.

<sup>110</sup> This provision seems to be supported by arts 63 and 64 of the *Family Law Statute Act* 10 of 2004 which deems marriages without consent not to exist.

<sup>111</sup> Article 16(2) of the *Family Law Statute Act* 10 of 2004 as cited by Plan International *In-depth Review* 22. This definition is similar to the definition of the English case of *Hyde v Hyde* 1866 LRIP & D13, in which a marriage was defined as "the voluntary union for life of one man and one woman to the exclusion of all others".

<sup>112</sup> Da Silva *et al* 2004 <http://www.wlsa.org.mz/article-why-polygamy-is-unacceptable-in-family-law-in-the-light-of-human-rights/>.

<sup>113</sup> Plan International *In-depth Review* 22 have observed that this provision "protects woman in a society whereby patriarchy favours men to engage in polygamous relations".

<sup>114</sup> Human Rights Committee *Concluding Observations: Mozambique* CCPR/C/MOZ/CO/1 (2013) para 9.

Apart from the definition section, several other provisions that regulate different aspects of marriage can be used to address women's rights violations in the context of polygyny. Firstly, the *Family Law Statute* provides that the validity of all marriages is subject to compliance with statutory requirements.<sup>115</sup> These requirements include that parties to a marriage must both be over the age of 18 years.<sup>116</sup> Similar observations made in the context of Kenya on the merits of setting a marriageable age at 18 apply *mutatis mutandis*. The *Family Law Statute*, therefore, complies with the international and constitutional standards on the marriageable age.<sup>117</sup> However, this protection is threatened with a clawback provision under the *Family Law Statute* that allows parties who are at the age of 16 to conclude a marriage with the approval of their parents.<sup>118</sup> As rightly observed by Plan International, the dangers inherent in this provision are compounded by the fact that this approval can be granted without providing specific reasons for allowing such marriages.<sup>119</sup> This position, unfortunately, undermines the *Family Law Statute's* efforts to address harmful cultural practices such as polygyny that may lead young girls into childhood polygynous unions.<sup>120</sup>

Protection in the context of property is provided in articles 101, 102 and 103 of the *Family Law Statute*. In their totality, these provisions provide that spouses have equal rights relating to the administration of their assets and the disposal of spousal property. In addition, this protection is also offered to women in *de facto* marriages.<sup>121</sup> Article 203(2) of the *Family Law Statute* extends equal protection relating to property acquired during the union to *de facto* marriages. Plan International has thus applauded the *Family Law Statute* for the wide scope of the protection it gives to women living in *de facto* unions.<sup>122</sup> In the context of women found in *de facto* polygyny, the *Family Law Statute* does not offer similar protection. This is irrespective of the fact that anecdotal research shows that informal polygyny is very common in Mozambique.<sup>123</sup> While extending legal protection to *de facto* marriages, the *Family Law Statute* should have equally provided protection

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<sup>115</sup> Plan International *In-depth Review* 18.

<sup>116</sup> Article 30(1) of the *Family Law Statute* 10 of 2004.

<sup>117</sup> Both art 6 of the *African Women's Protocol* and art 21 of the *African Children's Charter* set 18 as the marriageable age.

<sup>118</sup> Article 30(2) of the *Family Law Statute* 10 of 2004.

<sup>119</sup> Plan International *In-depth Review* 19.

<sup>120</sup> See, generally, the observations by Mandate *Assessing the Implementation of the Convention on the Rights of the Child*.

<sup>121</sup> *De facto* marriages in this context are marriages between a man and a woman for over a period of 1 year (12 months).

<sup>122</sup> Plan International *In-depth Review* 22.

<sup>123</sup> Da Silva *et al* 2004 <http://www.wlsa.org.mz/article-why-polygamy-is-unacceptable-in-family-law-in-the-light-of-human-rights/>.



to those women found in informal polygynous marriages. Moreover, as succinctly captured by Plan International:

The advantage of recognising *de facto* unions are that these unions can serve as the basis for women and girls married traditionally, where such marriages are not registered and which are therefore not recognised in statutory terms.<sup>124</sup>

This approach would have been in line with the international human rights position that requires States Parties to extend protection where polygyny is still practised.<sup>125</sup> Moreover, by not extending protection to these informal polygynous marriages, the *Family Law Statute* is in violation of article 119(2) of the Mozambique Constitution, which arguably requires the state to recognise and protect marriage as the institution that secures the pursuit of family objects.<sup>126</sup>

In addition, the *Family Law Statute*, just like the Constitution and the *Civil Registrar's Code* (that regulates the formalities and processes required for marriage registration) provides that marriages are valid if they are registered.<sup>127</sup> This position is similar to that taken in the *Marriage Act* in Kenya. In Mozambique, just as in Kenya, registration is one of the requirements for a valid marriage under the *Family Law Statute*. Similar arguments on the merits and demerits of registration as a requirement in the protection of women's rights discussed above in the context of Kenya apply equally in this context. Related to this point, the process for the registration of statutory and religious marriages under the *Family Law Statute* is different from that in customary marriages. For statutory and religious marriages, the *Family Law Statute* requires that these marriages are preceded by a preliminary process<sup>128</sup> which provides the opportunity for the Registrar to inquire if the marriage requirements have been met or not.<sup>129</sup> In contrast, for customary marriages, where polygynous unions are mostly to be found, the parties are not subjected to the same preliminary inquiry. This position unfortunately predisposes women find themselves involved in informal polygynous marriages without their knowledge. Moreover, the 2016 Plan International's study found that the registration infrastructure is generally poor.<sup>130</sup>

In conclusion, therefore, although the *Family Law Statute* adopts a prohibitionist approach in balancing polygyny and women's rights, the exploration reveals that more needs to be done to protect women's rights in

<sup>124</sup> Plan International *In-depth Review* 22.

<sup>125</sup> Article 6 of the *African Women's Protocol*.

<sup>126</sup> Plan International *In-depth Review* 22.

<sup>127</sup> Article 75 of the *Family Law Statute* 10 of 2004.

<sup>128</sup> Plan International *In-depth Review* 24.

<sup>129</sup> Plan International *In-depth Review* 24.

<sup>130</sup> Plan International *In-depth Review* 24.

the context of polygyny. For example, there is a need to improve the registration infrastructure. In addition, the continued existence of informal polygyny 10 years after the *Family Law Statute* came into effect can only be an indication that the practice is nowhere close to dying in Mozambique. Moreover, as Howland and Koenen rightly observe, "although polygyny is invariably discriminatory, one must consider the context in which it takes place before denying its recognition".<sup>131</sup>

### 4.3 South Africa

The *Recognition of Customary Marriages Act*, 1998 (RCMA) in South Africa was enacted to validate customary marriages. These include polygynous marriages.<sup>132</sup> The RCMA is different from traditional customary laws, however, in certain respects. It contains provisions for the equal status of spouses in a customary marriage,<sup>133</sup> minimum age requirements for customary marriages,<sup>134</sup> registration rules,<sup>135</sup> and rules applicable in community of property matrimonial regimes.<sup>136</sup> These changes are generally seen as milestones in the protection of women's rights in the context of customary marriages.<sup>137</sup>

For the purposes of this discussion, however, the RCMA has provisions that are specifically aimed at the recognition and regulation of polygynous marriages. For example, section 2(3) of the RCMA recognises all polygynous marriages concluded before the commencement of the Act.<sup>138</sup> In a similar fashion, section 2(4) provides for the recognition of polygamous marriages concluded after the commencement of the Act.<sup>139</sup> In order to

<sup>131</sup> Howland and Koenen 2014 *Social Justice* 37.

<sup>132</sup> This was after a very long history of the non-recognition of customary marriages due to *lobolo* and polygyny.

<sup>133</sup> Section 6 of the *Recognition of Customary Marriages Act* 120 of 1998 provides that "a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law".

<sup>134</sup> Section 3(1)(a)(i) of the *Recognition of Customary Marriages Act* 120 of 1998 provides that "for a customary marriage entered into after the commencement of this Act to be valid, the prospective spouses must both be above the age of 18 years". Also see Herbst and Du Plessis 2008 *EJCL* 6.

<sup>135</sup> Section 4 of the *Recognition of Customary Marriages Act* 120 of 1998. Also see Herbst and Du Plessis 2008 *EJCL* 9.

<sup>136</sup> Section 7 of the *Recognition of Customary Marriages Act* 120 of 1998 as read with *Gumede v President of South Africa* 2009 3 SA 152 (CC).

<sup>137</sup> Ndashe 2011 *Women Legal Centre* 5, 6.

<sup>138</sup> Section 2(3) of the *Recognition of Customary Marriages Act* 120 of 1998 provides that "if a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages".

<sup>139</sup> Section 2(4) of the *Recognition of Customary Marriages Act* 120 of 1998 provides that "if a person is a spouse in more than one customary marriage, all such marriages

protect women's matrimonial property in a polygynous marriage, the RCMA leaves the regulation of property for marriages recognised under section 2(3) to customary laws, which are patriarchal in nature.<sup>140</sup> This is problematic, as customary law grants the power to control property to a husband, and views a wife as a perpetual minor under the guardianship of the husband.<sup>141</sup>

For polygynous marriages recognised under section 2(4), the matrimonial property is regulated by section 7(6) of the RCMA as follows:

A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.<sup>142</sup>

Two main observations, however, can be made with regard to section 7(6) of the RCMA. First, this provision accords with the traditional customs, where the matrimonial property system was governed according to customary rules. According to these rules, a husband had the responsibility of distributing property between his wives in a polygynous marriage in such a way that each wife and her children established a separate autonomous house with its own assets allocated by the husband.<sup>143</sup>

Secondly, as Bennett has rightly observed, section 7(6) does not prescribe the terms of the contract. It has been suggested, however, that the intention seems to have been to establish an "out of community of property" matrimonial system.<sup>144</sup> This suggestion arguably resonates with the customary rules, where each wife establishes a separate autonomous house for her children and herself, with its own assets allocated by the husband.<sup>145</sup> Moreover, the "out of community of property" quality of the customary rules can be inferred from the fact that once assets have been allocated to a particular house, a husband is not permitted to move assets from one house to another without consulting the wife of the particular house and the eldest son.<sup>146</sup> Where assets have been so moved, an inter-house

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entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages".

<sup>140</sup> Section 7(1) of the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>141</sup> See generally discussions by Bennett *Customary Law* 251 who traces this rule "from antiquated common-law doctrine, which treated women in the same way as children".

<sup>142</sup> Section 7(6) of the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>143</sup> Olivier *et al Indigenous Law* 40. The matrimonial property system under customary law was neither in nor out of community of property. It was governed by patriarchal principles which essentially left the distribution and control of property to males.

<sup>144</sup> Bennett *Customary Law* 247.

<sup>145</sup> Olivier *et al Indigenous Law* 40.

<sup>146</sup> Olivier *et al Indigenous Law* 40.

debt is created between the houses.<sup>147</sup> Moreover, in terms of the customary rules of inheritance, children inherit property from their mothers' houses.<sup>148</sup>

As in the situation in Kenya and Mozambique (discussed above), the RCMA in South Africa contains provisions for the registration of customary marriages that can protect women from informal polygyny.<sup>149</sup> However, many women married under customary laws are unable to register their marriages for various reasons.<sup>150</sup> The effect of non-registration is that they are denied the right to inherit. This causes stark inequalities, particularly in polygynous marriages.<sup>151</sup> Moreover, registration does not address the fact that many women in South Africa are married in customary law to a man who is already married in terms of civil law without their knowledge.<sup>152</sup> In addition, the RCMA gives primacy to civil marriages over polygynous marriages, which results in many women being deprived of the potential protection offered by the RCMA.<sup>153</sup>

In conclusion, therefore, in balancing polygyny and the protection of women's rights, the RCMA tilts more towards the protection of polygyny as it was practised in the traditional system.

## 5 Analysis of legal responses

### 5.1 Reform or recognition of polygyny?

This exploration of the selected law reforms suggests that they seem to endorse polygyny as practised under traditional customary rules in the following ways. First, the provisions that recognise the practice only allow men to have more than one wife, and not vice versa. This reflects the age-old tradition of polygyny as practiced in most African countries.<sup>154</sup> Secondly, in regulating the matrimonial property of the polygynous marriages, these laws champion traditional patriarchal attitudes that leave the control and

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<sup>147</sup> Bennett *Customary Law* 258; Olivier *et al Indigenous Law* 54.

<sup>148</sup> Olivier *et al Indigenous Law* 149; Bennett *Customary Law* 259.

<sup>149</sup> Section 4 of the *Recognition of Customary Marriages Act* 120 of 1998. Registration is, however, not a requirement for the validity of a customary marriage under the Act. See eg s 4(9) of the *Recognition of Customary Marriages Act* 120 of 1998. Also see similar observations by Amien 2013 *Acta Juridica* 372.

<sup>150</sup> See generally Mwambene and Kruuse 2013 *Acta Juridica* 300, 301; Mwambene and Kruuse 2015 *IJLPF* 243.

<sup>151</sup> See the discussion in *Mayelane v Ngwenyama* 2013 4 SA 415 (CC).

<sup>152</sup> Mwambene and Kruuse 2015 *IJLPF* 252.

<sup>153</sup> Section 10(4) of the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>154</sup> See, for example, s 3 of the *Marriage Act* 4 of 2014 and ss 2(3) and 2(4) of the *Recognition of Customary Marriages Act* 120 of 1998. See the similar observation about the *Recognition of Customary Marriages Act* 120 of 1998 made by Higgins *et al* as cited in Mwambene 2015 *Speculum Juris* 72.

distribution of property to the husband.<sup>155</sup> In South Africa, for example, the RCMA provides that the matrimonial property system for polygynous marriages concluded before the Act to continue to be governed by customary laws.<sup>156</sup> In Mozambique the *Family Law Statute* is silent on this topic. It does not make any provision for the regulation of the property of women living in polygynous unions, including polygynous unions concluded before the inception of the Family Law Statute. One can therefore assume that customary patriarchal rules regulate matrimonial property in the context of informal polygynous marriages (including those that pre-date the *Family Law Statute*).

Thirdly, all of the laws under discussion recognise the equal status of the parties in polygynous marriages.<sup>157</sup> This is seen as a departure from the past where, according to the official customary rules, a wife in a customary marriage was a perpetual minor under the protection of her husband.<sup>158</sup> These laws therefore address the inequality between a husband and a wife in decision making that left the wife without legal capacity. However, in the context of polygyny, both the RCMA and the Kenya *Marriage Act* do not require the approval of the first wife when a husband wants to marry a subsequent wife. This is similar to the traditional rules as they were described by expert witnesses in the South African case of *Mayelane v Ngwenyama*.<sup>159</sup>

(a) although not the general practice any longer, VaTsonga men have a choice whether to enter into further customary marriages, (b) when VaTsonga men decide to do so they must inform their first wife of their intention, (c) it is expected of the first wife to agree and assist in the ensuing process leading to a further marriage, (d) if she does so, harmony is promoted between all concerned, (e) if she refuses consent, attempts are made to persuade her otherwise, (f) if that is unsuccessful, the respective families are called to play a role in resolving the problem, (g) this resolution process may result in divorce, and finally, (h) if the first wife is not informed of the impending marriage, the second union will not be recognised, but children of the second union will not be prejudiced by this as they will still be regarded as legitimate children.

Fourthly, these laws seem to comply with CEDAW's suggestion that states should register all marriages in order to ensure compliance with the

<sup>155</sup> See for example, s 7 of the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>156</sup> See s 7(1) of the *Recognition of Customary Marriages Act* 120 of 1998. According to customary rules regulating matrimonial property, the control of family, house or personal property is vested in the husband. Also see Mwambene and Van Nierkerk 2009 *Speculum Juris* 94, 95. This position was not changed by *Gumede v President of South Africa* 2009 3 SA 152 (CC), which affected only the matrimonial property system of monogamous marriages concluded before the Act.

<sup>157</sup> Section 6 of the *Recognition of Customary Marriages Act* 120 of 1998; s 3(2) of the *Marriage Act* 4 of 2014; and art 36 of the *Family Law Statute Act* 10 of 2004.

<sup>158</sup> See for example, in South Africa, s 11(3) of the *Black Administration Act* 38 of 1927.

<sup>159</sup> *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) para 61.

Convention and establish equality between the partners, a minimum age for marriage, the prohibition of bigamy and polygamy, and the protection of the rights of children.<sup>160</sup> Despite the fact that the legislation contains provisions pertaining to registration, it remains one of the obstacles against the protection of women in the context of polygyny. For example, in South Africa, despite the provision requiring registration, most customary marriages are not registered.<sup>161</sup> Of course, registration under the RCMA does not validate a customary marriage.<sup>162</sup> Arguably, the RCMA adopts the traditional views that the registration of a customary marriage is not important since the conclusion of a customary marriage involves many people that would attest to the validity of the same.<sup>163</sup> In the context of Mozambique, where most people marry according to customary law, evidence shows that few of these marriages are registered.<sup>164</sup>

I therefore, ask if in their attempts to balance polygyny and women's rights the selected countries are reforming or recognising the existing practices. Whereas this paper does not attempt to answer that question, the outcomes of the different approaches adopted by Kenya and South Africa in particular would seem to be obvious: they are simply recognising polygyny as practised under the traditional customary rules.

## **5.2 Prohibit, regulate or legalise?**

An examination of the law reforms in Kenya, Mozambique and South Africa seem to suggest that law reform that explicitly outlaws polygamy is unlikely to be supported in many African countries.<sup>165</sup> The process of drafting the RCMA, the Kenya *Marriage Act* and the *Family Law Statute* bears testimony to the challenges of adopting the prohibitionist approach to polygyny in Africa. In South Africa, for example, the Law Commission reasoned that the pressure that leads women into polygynous marriages cannot be legally controlled. Adopting the prohibitionist approach would consequently lead to more informal unions that would leave many women not legally protected.<sup>166</sup> In Mozambique the approach is not clear, since the word polygyny is not

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<sup>160</sup> Article 16 of CEDAW.

<sup>161</sup> See, eg, Ndashe 2011 *Women Legal Centre* 12; Mwambene and Kruuse 2013 *Acta Juridica* 300.

<sup>162</sup> Section 4(9) of the RCMA.

<sup>163</sup> Herbst and Du Plessis 2008 *EJCL* 9.

<sup>164</sup> See, generally, the observations made by Plan International *In-depth Review*.

<sup>165</sup> Apart from the three countries under study, the failed attempts of Malawi and Uganda to pass prohibitionist legislation would seem to attest to this fact.

<sup>166</sup> South Africa Law Reform Commission 1998 [http://www.justice.gov.za/salrc/reports/r\\_prj90\\_cstm\\_1998aug.pdf](http://www.justice.gov.za/salrc/reports/r_prj90_cstm_1998aug.pdf) 87. Howland and Koenen 2014 *Social Justice* 32 cautions that "prohibiting polygyny could have the unwanted effect of encouraging informal *de facto* polygamous relationships that provide no legal protection to women and children".

expressly used in the *Family Law Statute*.<sup>167</sup> In this light, perhaps, law reform should instead of prohibiting the practice adopt a regulatory approach which is preceded by other measures that focus on advancing the socio-economic factors that predispose women to polygyny. Such other measures would include addressing women's lack of education and empowering them economically, among others.<sup>168</sup>

### **5.3 Challenges to reforming polygyny in Africa**

The exploration of the law reforms in the selected countries has revealed the difficulties inherent in attempting to strike a balance between polygyny and women's rights through legalising polygyny, prohibiting it, or regulating it, chief of which is the sharp growth in the practice of informal polygyny on the African continent.<sup>169</sup> The prevalence of informal polygyny makes it difficult to assess the impact of the different legislative approaches on advancing the rights of women. One can therefore ask if the proliferation of informal polygynous unions indicates that the law reform scrutinised here does not reflect social reality, and if people are deliberately avoiding it. Whereas this question would be the subject of research on another day, existing research informs us that most men and women are ignorant of the new laws and their protective nature. As widely observed, it is therefore important that such reforms are accompanied by education and awareness campaigns.

## **6 Conclusion**

This paper has explored the different approaches taken by three African countries to advancing the rights of women in the context of polygynous customary marriages. The exploration has shown that whether countries legalise, abolish or regulate the practice, the reality is the following: what the law says is not what people do; the provisions pertaining to equality between spouses allow for inequality; polygyny is transforming into unofficial relationships which leave most women without legal protection; and law reform is heavily influenced by customary laws that continue to disadvantage women in these marriages. These observations lead to the conclusion that whether countries legalise, abolish or regulate polygyny, ultimately the essence of polygyny in Africa is not going to change. It is therefore recommended that in order to protect women against the

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<sup>167</sup> This is to be contrasted with Rwanda, which expressly prohibited polygamy on the grounds that discrimination is not allowed in its *Constitution of the Republic of Rwanda*, 2003, which was adopted on April 23, 2003 and approved by referendum on May 26, 2003.

<sup>168</sup> Howland and Koenen 2014 *Social Justice* 32.

<sup>169</sup> See generally Ovis 2005 <http://www.lac.org.na/news/inthenews/pdf/polygamy.pdf> 1 on predictions made by Vision 2030 in Namibia.

violations of their rights that come with polygyny, the law reform should be accompanied by education and awareness campaigns and by practical policy and enforcement mechanisms.

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## List of Abbreviations

ACHPR	African Charter on Human and People's Rights
Afr Sociol Rev	African Sociological Review
AHRLJ	African Human Rights Law Journal
AJET	African Journal of Evangelical Theology
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
EJCL	Electronic Journal of Comparative Law
Emory LJ	Emory Law Journal
Comp L Rev	Comparative Law Review
ICCPR	International Convention on Civil and Political Rights
IJLPF	International Journal of Law, Policy and the Family
JAL	Journal of African Law
JASD	Journal of African Studies and Development
JCT	Journal of Constructive Theology
MPA	Matrimonial Property Act
Nat'l J Const L	National Journal of Constitutional Law
NQHR	Netherlands Quarterly of Human Rights
RCMA	Recognition of Customary Marriages Act
SAJHR	South African Journal on Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
Wash & Lee L Rev	Washington and Lee Law Review
WLSA	Women and Law in Southern Africa